No. 82-2001

# In the Supreme Court of the United States

OCTOBER TERM, 1982

GUY VANDER JAGT, ET AL., PETITIONERS

*v.*

THOMAS P. O'NEILL, JR., ET AL., RESPONDENTS

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Do individual Republican Members of Congress suing as members, voters and representatives of a class of citizens have standing to bring an action against the Democratic leadership of the House claiming that allocation of committee assignments by the Democratic Caucus, as adopted by the full House, violate the equal protection clause and their associational and free speech rights under the Constitution?

2. Whether the Speech and Debate Clause protects Democratic respondents in debating and voting the committee allocations in Caucus, as subsequently ratified by the full House of Representatives.

3. Whether the numerical representation on committees of members from both parties is textually committed to the House by operation of the Article I, §5 delegation to the House to determine its rules.

4. Whether the doctrine of separation of powers precludes the judiciary from interfering in a decision arrived at by a vote of the full House sought to be overturned by a frustrated minority within the House.

5. Whether a case brought by Members alleging the unconstitutionality of committee assignments for the 97th Congress is moot by virtue of the expiration of that Congress.

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## BRIEF IN OPPOSITION

The Respondents herein, the Honorable Thomas P. O'Neill, Jr., Speaker, the Honorable Jim Wright, Majority Leader,[1] the Honorable Gillis W. Long, Chairman of the Democratic Caucus, the Democratic Steering and Policy Committee, and the Democratic Caucus, United States House of Representatives, respectfully submit that the petition for writ of certiorari, seeking review of the opinion of United States Court of Appeals for the

[1] Petitioners allege that they do not sue respondents "in their capacity as officers or Members of the Congress." Pet. p. 3 n.1. It is clear that respondents are sued in their official capacities in that they are named for actions performed by organizations within the House composed *exclusively* of Members, or Members-elect which receive appropriated funds to function and which are otherwise officially sanctioned by the Congress. *E.g.*, 2 U.S.C. § 29a(b)(1)(B) (transportation to and from the caucuses and per diem expenses for Member and aide); Legislative Branch Appropriations Act for 1978, Pub.L.No. 95-391, 92 Stat. 763, 776 (Sept. 30, 1978) (permanent staff for caucuses).

District of Columbia Circuit in this case should be denied. Respondents submit that no unsettled or substantial question is presented by the petition, the decision is not in conflict with the decision of any other circuit, or of this Court, on the same matter, and that the case is rendered moot by the lapse of the 97th Congress.

## JURISDICTION

The judgment of the court of appeals was entered on December 23, 1982. Petitioners did not include a copy of the judgment in their petition, as required by Rule 21.1(k)(iii), so Respondents have appended the judgment hereto as Appendix A.

## STATEMENT OF THE CASE

Respondents believe it is necessary to add a few words to petitioners' description of the case, particularly in view of the extraordinary relief sought by petitioners.

Petitioners sought injunctive and declaratory relief, including a declaration that the House resolution establishing committee assignments is unconstitutional; a permanent injunction against an allocation of committee assignments "in any manner that unfairly discriminates against a Member because of his party affiliation," Complaint ¶s 55A–55C, as well as a writ of mandamus "compelling defendants to assign seats on committees and subcommittees . . . in accordance with the Rules of Procedure of the House . . ." Complaint ¶89.

The extraordinary relief sought, in effect, would place organization of the House of Representatives into judicial receivership and require obliteration of party affiliation from the conduct of House affairs.

In a remarkable display of judicial naivete and arrogance, the court of appeals, while declining jurisdiction, concluded "we probably could fashion a mathematically administrable remedy—even if it proved awkward as the Supreme Court's remedies in the voting rights cases . . ." Pet. App. 26a–27a. 699 F.2d at 1176, n.27. The separate opinion remarked on the apocryphal result of granting petitioners' relief which could only be enforced by holding respondents "in contempt should they fail to reconstitute the House's committees and subcommittees as desired." Pet. App. 37a. 699 F.2d at 1181. But

"[m]erely to state what is sought is to make plain that appellants propose nothing less than a revolution in the judiciary's relationship to the political branches." Pet. App. 37a. Nevertheless, the court declined to enter the relief requested, a result which should be left undisturbed by this Court for the reasons identified by the concurring Judge below.

Respondents do not believe that review of this case is necessary because its precedential impact is minimal. The panel majority opinion is authored by a visiting district judge not from the D.C. Circuit sitting by designation and the other circuit judge on the panel concurred in the judgment, but explicitly rejected the basis of affirmance. In sum, the decision represents the weight of only one Circuit Judge from the panel.

Respondents do believe that the panel majority's opinion is erroneous insofar as it dispatched, without deciding threshold constitutional and jurisdictional defenses which respondents believe fully dispose of the case, most prominently among them, the Speech or Debate Clause defense.. The panel criticized controlling caselaw from this Court as "awkward," and suggested that immunizing the organizational activities of the Caucus would be "extremely slippery" and "might hamstring us in the future." *Vander Jagt* v. *O'Neill,* 699 F.2d at 1172, Pet. App. 16a. Of course, the Clause is designed to "hamstring" the coordinate branches from invading the legislative sphere. *United States* v. *Helstoski,* 442 U.S. 477, 488–491 (1979). As the concurring opinion indicates, the majority's attempt to avoid ruling on the legislative immunity ignores the priority assigned to deciding this issue mandated by this Court, *Vander Jagt* v. *O'Neill,* 69 F.2d at 1185n.5 (Bork, J. concurring) Pet. App. 45a.

Nor can Respondents accede to the panel's remarkable assertion that federal courts may now review internal rules of the House to determine validity as applied to proceedings of the House despite contrary precedent in the Circuit. *Vander Jagt* v. *O'Neill,* 699 F.2d at 1172 n.14. Pet. App. p. 18a. The panel majority rested this proposition in *United States* v. *Ballin,* 144 U.S. 1 (1892) a case reviewing whether the proper procedure for enactment of laws had been followed, *i.e.*, whether a "sufficient quorum was present." *Vander Jagt* v. *O'Neill,* 699 F.2d

at 1172. Pet. App. 17a. Judicial review of congressional rulemaking to determine whether the prerequisited of constitutional lawmaking are satisfied, a traditional function performed by federal courts, *Chadha* v. *Immigration and Naturalization Service*, 51 U.S.L.W. 4907 (U.S., June 23, 1983), is fundamentally different from the court of appeals novel assertion that as to disputes among legislators it is a "judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity." *Vander Jagt* v. *O'Neill*, 699 F.2d at 1173, Pet. App. p. 20a. This is indeed a radical departure from *stare decisis* and nothing in *Ballin* justifies such a quantum accretion of judicial power over the legislature. And it was, as remarked by the panel, the full House of Representatives which approved the challenged committee assignments. *Id.*, 699 F.2d at 1172. Pet. App. 17a.

But, these are matters of intra-circuit conflict and clear error that need not be addressed by this Court, given the limited precedential impact of the decision already discussed. Respondents discuss it solely to buttress the compelling reasons for vacating the decision below to prevent against its "spawning any legal consequences" since the case is moot, as discussed *infra*.

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. THE CASE IS MOOT

Petitioners brought this action in the district court following the organization of the House of Representatives for the 97th Congress, which commenced on January 5, 1981, 127 *Cong. Rec.* H1 (daily ed. Jan. 5, 1981) and which adjourned *sine die* on December 21, 1982. 128 *Cong. Rec.* H10705 (daily ed. Dec. 21, 1982). The House of Representatives for the 97th Congress lapsed on January 3, 1983, at 12:00 o'clock noon, when the hour for the convening of the 98th Congress arrived. 129 *Cong. Rec.* H1 (daily ed., Jan. 3, 1983). *McGrain* v. *Daugherty*, 273 U.S. 135, 182 (1927); *Gojack* v. *United States*, 384 U.S. 702, 706–707 n.4 (1966).

The House of Representatives proceeded to organize itself over the ensuing weeks and pursuant to the rules of the House

adopted for the 98th Congress, adopted new committee allocations and assignments. 129 *Cong. Rec.* H66–69 (daily ed., Jan. 6, 1983).

These assignments superceded the allocations enacted by the previously 97th Congress on the basis of which the petitioners filed their complaint in the district court.

It is well settled that this Court's jurisdiction is limited by Article III to "live" cases or controversies and that where superceding events deprive the court's of a "live" controversy on which to exercise jurisdiction, the action is mooted. *Powell* v. *McCormack*, 395 U.S. 486, 495–501 (1969). *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), *Fortson* v. *Toombs*, 379 U.S. 621, 622 (1965).

In this case, petitioners sue to alter committee assignments in a Congress which has expired and no judgment by this court can have any effect on the allocations achieved, or the constitutional deprivations they allegedly caused, to petitioners during the 97th Congress. In short, no court can "affect the rights of litigants in the case before them," *DeFunis* v. *Odegaard*, 416 U.S. at 316, because the House which acted to affect petitioners rights has expired.[2]

None of the exceptions to the mootness doctrine save the petitioners cause from total extinction with the expiration of the 97th Congress. The petitioners have no claim for back salary or other rights and emoluments of office which remain viable despite expiration of the 97th Congress. *Powell* v. *McCormack*, 395 U.S. at 496. *Bond* v. *Floyd*, 385 U.S. 116, 128 n.4 (1966).

Indeed, petitioners' cause of action was arguably moot in the court below because the judgment was entered on December 23, 1982, two days after the House of Representatives adjourned *sine die*. 128 Cong. Rec. H10705, (daily ed. Dec. 23, 1982).[3]

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[2] Indeed, the intervening general election, in which Democrats were elected to approximately 62% of the House and Republicans to 38% of the House seats (a diminution of almost 5%), resulted in different Democrat-Republican committee "ratios" for the 98th Congress.

[3] The court of appeals heard argument and the case was submitted on March 19, 1982. *Vander Jagt* v. *O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982)

The mootness of the case appears from facts that are subject to judicial notice, even though extrinsic to the record developed below, and, of course, since the absence of a "live" controversy is firmly embedded as a prerequisite to the exercise of Article III judicial power, it may not be waived or disregarded by stipulation of the parties. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

Petitioners contend that the Democratic leadership and Caucus unconstitutionally discriminated against Republican members in "systematically" underrepresenting them on key House committees by allocating seats to Republicans disproportionately to their representation in the House, Pet. at 4. Claiming that Republicans were elected to 44.14% of House seats for the 97th Congress, they contend that the Democratic majority allocated only 34.29% of the seats on certain major committees to Republicans. Pet. App. 7a. All this is now academic in view of the expiration of the 97th Congress, and with it the allocations adopted by that House.

2. PETITIONERS HAVE ADVANCED NO SUBSTANTIAL OR IMPORTANT REASON FOR GRANTING THE WRIT

The petitioners, without great subtlety, have simply converted the petition or certiorari, which is to be addressed to the reasons why this court *should even hear the case,* into an argument on the merits of why the court below was wrong. In a cryptic sentence, petitioners pay lip service to the requirements of Rule 17 setting forth the factors on which the Court decides to hear cases declaring that the case involves an

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Pet. App., p. 5a. the opinion was not issued until February 4, 1983, approximately six (6) weeks after the judgment affirming the district court was entered. Even if the case was not technically moot on December 23, 1982 when the judgment was issued, it certainly was on February 4, 1983 when the opinion was issued. This raises in Respondents' view whether, if the case is now moot, the proper course is to vacate the judgment below and remand with instructions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). It would appear necessary and appropriate to do so in this case to prevent "a judgment, unreviewable because of mootness from spawning any legal consequences." *Goldwater* v. *Carter*, 444 U.S. 999 (1979) (mem.) (Rehnquist, J., concurring) *quoting United States* v. *Munsingwear, Inc.*, *supra* at 41.

"important question" of federal law which has not been, but should be settled by this Court. Pet., p. 7. What that question is, or why it needs to be addressed by this Court the petitioners fail to announce and quickly proceed to a discussion of the merits of their claim and the alleged error below.

It is well settled hat this Court does not sit as a "court of error" over the federal courts of appeals, but rather that its function, under principles applicable even before passage of the certiorari statute, is "to resolve conflicts of opinion of federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, law and treaties of the United States, and to exercise supervisory power over lower federal courts." Address of Chief Justice Vinson before the American Bar Association, 69 S.Ct. v, vi (1949). *See also*, R. Stern & E. Gressman, *Supreme Court Practice*, § 4.2 (5th ed. 1978).

Petitioners supply no decision of any court of appeals with which the decision below is in conflict, Supreme Court Rule 17(i)(a),[4] and no applicable decision of this Court with which the decision below conflicts. *Id.* ¶(1)(c).

The court of appeals declined to exercise its jurisdiction to decide an intra-legislative dispute at the behest of a small group of legislators on the losing side of the proposition—in this case adoption of committee allocations by the full House of Representatives. The soundness of the court of appeals decision to refuse to referee disputes among legislators is self-apparent, lest "the federal courts . . . become a higher legislature where a Congressman who has failed to persuade his colleagues can always renew the battle." *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873, 882 (D.C. Cir. 1981). It fully accords with the approach of this Court to refuse adjudication that artificially invokes judicial power where the parties have adequate non-judicial resources with which to seek redress. *Goldwater* v. *Carter*, 444 U.S. 996, 1005 (1979) (*mem.*) (Rehnquist J., concurring).

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[4] The one other court of appeals decision on the same matter is in accord. *Davids* v. *Akers*, 549 F.2d 120 (9th Cir. 1977) (Arizona legislature's committee ratios). This was specifically noted by the panel below, but ignored by petitioners. *Vander Jagt* v. *O'Neill*, 699 F.2d at 1175. Pet. App. p. 24a.

Petitioners have been deprived of neither the right to vote in committee, or on the floor of the House, *Powell* v. *McCormack*, 395 U.S. 486 (1969) and the contention that their power has been "diluted" or "diminished" simply is not the kind of concrete injury viewed as sufficient to invoke Article III, particularly given the obvious separation of powers problems inherent in seeking the kind of judicial oversight and management of the internal affairs of the House of Representatives required to redress the imbalance in committee assignments alleged to exist by petitioners.

Petitioners reliance on *Powell*, an *exclusion* case depriving a Representative-elect of *any* vote or rights, and *Bond* v. *Floyd*, 385 U.S. 116 (1966) involving a similar refusal by a legislature to seat a representative elect on the basis of the content of free speech, are wholly misplaced. Neither is *Elrod* v. *Burns*, 427 U.S. 347 (1976) on point, a case deciding whether political affiliation is a constitutionally permissible qualification for holding public employment in non-policy making positions. These cases clearly do not addresss the question presented by judicial intervention into allocation of committee seats among Members of the federal legislature.

Relying on the principles enunciated in the reapportionment cases involving malapportionment by *state* legislatures affecting the rights of *citizens* to proportionate representation, petitioners nevertheless concede that they bring the action "as legislators *qua* legislators," Pet. pp. 24–25, not as private plaintiffs. The reapportionment cases have absolutely no bearing on the separate issue of intra-legislative allocation of committees assignments.[6] Despite the procrustean effort by Petitioners to make this a reapportionment or voting rights case, it simply defies such categorization and therefore the body of law used to demonstrate the supposed conflict between the law of this Court and the decision of the court below is little more than an

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[6] As pointed out during oral argument by the concurring judge, the committee system by its nature, deprives some Members, of which ever party they happen to belong, of *equal* representation on committees:

"Doesn't the committee system itself disturb or upset the entire one man/one vote principle? People whose Representatives aren't on those committees simply aren't represented as much as these Members are."

Tr. Oral Argument at 17, line 400–403. (March 19, 1982).

argumentative technique on the merits, not an analytical basis for justifying a grant of certiorari and demonstrates the total lack of merit in the petition.

3. THE DECISION BELOW NOT TO EXERCISE JURISDICTION UNDER THE DOCTRINE OF REMEDIAL DISCRETION DOES NOT WARRANT REVIEW BY THIS COURT

Petitioners seek to invoke this Court's power to review declination of the court below to grant discretionary injunctive and declaratory relief against respondents. Indeed, the doctrine of "circumscribed equitable discretion" relied upon by the Court below recognizes the "axiom[] that the request for declaratory relief is discretionary with the court." *Vander Jagt* v. *O'Neill*, 699 F.2d at 1175, n. 25; Pet. App. 23a. *See also Riegle* v. *Federal Open Market Committee*, 656 F.2d at 881. That the court was exercising its discretion to withhold declaratory relief is explicit: "Our discretion to withhold equitable and declaratory relief supplies us with ample foundation upon which to base our decision." Pet. App. p. 27a, *Vander Jagt* v. *O'Neill*, 699 F.2d at 1177.

Petitioners have not demonstrated, or even addressed, how the withholding of injunctive and declaratory relief by the court below is an abuse of discretion which warrants oversight by this Court. They are content to rest their request on generalities that the court below abdicated its "duty" to decide the case, yet there is no showing of a harm of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment," *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), or how the withholding of discretionary relief below has harmed petitioners.

In view of the potentiality for "[r]epeated and essentially head on confrontations between the life tenured branch and the representative branches," *Valley Forge Christian College* v. *Americans United For Separation of Church and State*, 454 U.S. 464, 474 (1982), arising from a judicial order on how to organize the House of Representatives, the exercise of discretion was wholly appropriate, and need not be reviewed by this Court.

## CONCLUSION

For the reasons set forth above, respondents respectfully request that the petition for *certiorari* be denied.

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JULY 8, 1983.

## APPENDIX A

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CIVIL ACTION No. 81-01722

No. 81-2150

DEC 23 1982 September Term, 1982

GUY VANDER JAGT, ET AL., APPELLANTS

*v.*

THOMAS O'NEILL, JR., ET AL.

*Appeal from the United States District Court for the District of Columbia*

Before: Bork, Circuit Judge, Robb, Senior Circuit Judge, and James F. Gordon,* Senior District Judge for the Western District of Kentucky.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court Court for the District of Columbia, and was argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court from which this appeal has been taken is hereby affirmed. Opinion will follow.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk.*

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).



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